ESTOPPEL — PRINCIPAL AND AGENT.

WITH the kind consent of the Editor, I reply to a criticism of the HARVARD LAW REVIEW. The point has, through correspondence, been reduced to the following form:

A buyer has authority from a firm to purchase for cash only; it is the ordinary business custom for such a buyer to purchase upon credit; he buys upon credit (A) from an American dealer who is aware of the custom, (B) from a Patagonian just arrived who knows nothing of the custom. Under these circumstances, the HARVARD LAW REVIEW would say:

"It has, however, been pointed out [1] that where a third party makes a contract with an agent having apparent authority, the principal is bound, whether the party has knowledge of the usual course of business in question or not — whether he is misled by knowledge or ignorance." "But it is clear . . . that in every case of this class it requires the same proof to create an estoppel as it does to establish agency within apparent authority." Thus, in the one case (where there is knowledge) liability "rests upon agency or estoppel, whichever the third party may choose to invoke"; whereas in the other case (where there is ignorance) "the principal's liability can be accounted for only on the ground of agency." [2]

My contention, upon the contrary, is, that in neither case can there be liability upon the ground of agency; that only in the case of the American can there be liability at all; and that in that case it rests upon estoppel.

The HARVARD LAW REVIEW does not, in my opinion, sufficiently distinguish between real agency and the appearance of it, that is to say, between agency and no agency.

Our supposititious case affirms that the buyer had no authority to buy upon credit. Therefore the contracts which he made were outside his authority, in other words, outside his agency. If so, it would seem to be quite clear that the firm cannot be liable because of agency.

It may be said that there was the appearance of agency, and that the firm is liable because of that appearance. Very well, let us adhere to that. The firm is liable (if at all) not upon the ground

[1] The Green Bag, Vol. 13, p. 50, criticising Ewart on Estoppel.

[2] 15 HARV. L. REV. 324.

of agency then, but upon the ground of the appearance of agency; that is, upon the ground of estoppel.

Now, to whom was there appearance of agency? The American may fairly claim that he was misled by the appearance. He knew the custom; he dealt upon the faith of it; he was ignorant of any special limitation of authority in the particular case; acting reasonably, he assumed the existence of agency; and he changed his position upon the faith of an appearance which to him spelled agency. But what about the Patagonian? To him there was no appearance of agency. Not being aware of the custom, he did not rely upon it; he did not deal upon the faith of it; its existence affected him in no way; for him it was non-existent; he cannot assert that he changed his position because of it — because of any appearance of agency. He cannot, therefore, succeed by estoppel; and as, *ex hypothesi*, there was no real agency, he cannot succeed at all.

Let us follow the course of the Patagonian's action at the trial. He proves the buyer's agency by putting in the written authority. This document specifically declares that the buyer shall have authority to buy for cash only. Proof is then given of a purchase upon credit. Verdict for defendant.

Or, after proving the written authority and the contract, the Patagonian proves that usually such buyers have authority to buy upon credit. Verdict for defendant.

Or, going a step further, he proves that the custom of intrusting such buyers with such authority is so general that persons aware of the custom would have been misled by the appearance of authority to buy upon credit. As for himself, he admits that he first heard of such custom from the previous witness, and that it had nothing to do with his contract. Verdict still, as I think, for defendant.

And the reason is clear: there was no authority to make the contract, but to some persons an appearance of authority only. There was no agency therefore, and no liability because of it. For estoppel, upon the other hand, it is not sufficient to allege that some people might under the same circumstances have been misled. You must say that the appearances misled you. The law is well stated by Irvine, C.:

"Where a principal has by his voluntary act placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming

that such agent has authority to perform a particular act and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's work."[1]

The important question is

"What did such third person believe and have a right to believe as to the agent, from the acts of the principal?"[2]

The HARVARD LAW REVIEW, I venture to say, is not merely wrong when it says that

"It is clear that in every case of this class it requires the same proof to create an estoppel as it does to establish agency within apparent authority";

but it is confusing agency and no agency, and is misapplying terms.

For what is "agency within apparent authority," but agency beyond real authority? And agency beyond real authority of course is not agency at all. "Agency within apparent authority," then, is agency and no agency. In other words, the terms are as contradictory as if you said, "partnership within appearance of partnership," meaning partnership when there was no partnership; or "marriage within appearance of marriage," with a meaning that the criminal law might have occasion to explain to you.

And how can the same proof "create an estoppel" and at the same time "establish agency"? Estoppel exists, and can only exist, not where there is agency, but where there is none. If the evidence shows agency, that is an end of the case — the principal is bound. If it fails to prove agency, that may be the beginning of estoppel. It might as well be said that it requires the same proof to establish ratification as agency. Ratification happens only when there is no original agency to do the act. In both cases, estoppel and ratification, you prove the act done without authority (you do not prove agency, but no agency), and you then proceed to show why, nevertheless, you ought to succeed.[3]

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[1] Johnson *v.* Milwaukee (1895), 46 Neb. 480; 64 N. W. Rep. 1100; approved in Holt *v.* Schneider (1899), 77 N. W. Rep. 1086.

[2] Heath *v.* Stoddart (1898), 91 Me. 499; 40 Atl. Rep. 547.

[3] As Lord Cranworth says: You prove one thing *or* the other, — you "must show that the agency did exist and that the agent had the authority he assumed to exercise, *or otherwise* that the principal is estopped from disputing it." Pole *v.* Leask (1863), 33 L. J. Ch. 162.

But the REVIEW will reply that its allegation was that "it requires the same proof to create an estoppel as it does to establish agency *within apparent authority*." Very well, then the same proof will not prove estoppel and *real* agency. Is that admitted? No doubt the same evidence may prove estoppel and apparent, not real, agency, for the reason that proving apparent agency is a part of the proof of estoppel. If that is what is meant, little objection can be made to the sentence, except to the inaccuracy of its phraseology. For example, in the action brought by the American, the written authority shows that there was no real agency; and the plaintiff succeeds, not because the evidence established agency, but because, there being none, he proved the appearance of agency — he proved estoppel.

Possibly I may be confronted with such statements as this:

"The authority of an agent to perform all things usual in the line of business in which he is employed cannot be limited by any private order or direction not known to the party dealing with him."[1]

Such language is frequently met with, but with submission it is either trivial or false. If it is meant as an assertion of the patent truism that a man cannot do two opposite things at the same moment, — give authority "to perform *all* things usual," and at the same time withhold authority to do *some* of those things, — it may be allowed to pass as true but jejune. But if it is intended as an assertion that a man cannot give any sort of authority that he pleases, and may not introduce into his power of attorney such ingenious inventions of authority and limitations of authority as may suit his whim or fancy, it is merely untrue.

You tell me that I cannot employ a buyer and give him authority to buy for cash only; and I protest that I can, and that the cases in hand are of that character. You tell me that I cannot employ, say, a floor-walker, and withhold from him authority to do those things which a floor-walker usually does. I admit that, if your assertion is merely that I cannot give a man *all* the authority of a floor-walker and at the same time not give him *some* of such authority. Omnipotence itself cannot do that. But if you mean that I cannot authorize a man to perform some of those duties usually performed by a floor-walker and not assign to him the rest of such duties, I protest again that nothing is more simple. You may tell me that in such a case I have not appointed a

[1] Smith's Mer. Law, 10th ed. 140; Bryant *v.* Moore (1846), 26 Me. 84.

floor-walker at all. I reply that I did not say that I had. You suggest that if I authorized a man to perform the more conspicuous duties of a floor-walker, and withheld from him some authority which such an employee usually possessed, people would be misled by his appearance of wider authority than that really given to him. I agree: Yes, people may be misled by what I have done, and if so I may be bound; but not because I authorized the act (for I did not), and not therefore because of agency to do the act, but because of the appearance of agency, that is, by estoppel to deny it.

I may be confronted also with the declaration that

"The general rule is . . . that the agent is authorized to do whatever is usual to carry out the object of his agency."[1]

To which I reply that there is no rule of law as to the existence of matters of fact. It may quite properly be said that "generally the agent is authorized to do whatever," etc., but not that there is any general rule of law to that effect.

Or it may be said that

"A person who employs a broker must be supposed to give him authority to act as other brokers do."[2]

To this there is no objection, except when applied to cases in which the supposition would reverse the facts. For it is one thing to say that the employment of a broker (*simpliciter*) *means* intrusting him with usual powers; and quite a different thing to say that if the Court has before it a written power of attorney withholding some of these powers, nevertheless the "broker *must be supposed*" to have those very powers. Insert in the above quotation "unless restricted," and Story would agree with it; otherwise he would dissent.[3] In other words, employment to do an act will be interpreted to include a grant of medium powers;[4] unless, of course, such interpretation is precluded by the form of the instrument.[5] Law can be rationally administered without altering the facts.

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[1] 2 Benj. on Sales, § 945; quoting from Reese *v.* Bates (1897), 94 Va. 321; 26 S. E. Rep. 865.

[2] Sutton *v.* Latham (1839), 10 Ad. & E. 30; 8 L. J. Q. B. 210.

[3] Story on Agency, § 59. And see Schuchardt *v.* Allens (1863), 1 Wall. 369; Belmont *v.* Talbot (1899), 51 S. W. Rep. 588 (Ky.).

[4] See cases cited in Ewart on Estoppel, pp. 488–491.

[5] "It is true that when an agency is created by a written instrument the nature and extent of the authority must be ascertained from the instrument itself and cannot be enlarged by parol proof." Cawthorn *v.* Lusk (1892), 97 Ala. 674; 11 So. Rep. 731.

Returning now to our cases, it will be seen that the firm cannot be liable for purchases made upon credit upon the ground of agency; because there was no agency — no authority, to buy upon credit. The plaintiffs then must succeed, if at all, upon the ground of the appearance of agency, that is, upon the ground of estoppel. And the American will succeed and the Patagonian will fail.

Analogy may help us a little. Here are two persons who have widely represented themselves as partners, but in reality are not so related. Contracts are made by the real proprietor of the business, (A) with an American who knows of the representation, and, (B) with a Patagonian, just arrived, who knows nothing of it. Is the ostensible partner liable upon the contracts? These cases are not far removed from those which we have been considering, and there is no difference between them with respect to the point under discussion. And yet their usual method of treatment is very different. Few would suggest that in these partnership cases an appearance of authority to all Americans would be of the slightest help to the Patagonian.

Formerly and prior to the development of the principles of the law of estoppel the Patagonian would have been all right;[1] but now it is quite clear that the law is as declared by Mr. Justice Gray:

"A person who is not in fact a partner . . . cannot be made liable upon contracts of the partnership except with those who have contracted with the partnership upon the faith of such holding out. . . . But the rule of law is always the same, the one who has no knowledge or belief that the defendant was held out as a partner, and did nothing on the faith of such a knowledge or belief, cannot charge him with liability as a partner if he was not a partner in fact."[2]

James, C. J., is to the same effect:

"The absence of a partnership in fact being established, it devolved on plaintiffs to show that, as to them, defendants were nevertheless partners by estoppel. It was essential to do this in order to show that the representation or acts upon which they relied to create the ostensible relation, occurred on or prior to the time of the transaction, and had come to the knowledge of the plaintiffs; otherwise it is clear that they could not have been affected or influenced thereby."[3]

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[1] Martin *v.* Gray (1863), 14 C. B N. S. 839.

[2] Thompson *v.* First National Bank (1883), 111 U. S. 535, 536.

[3] Burrows *v.* Grover (1897), 41 S. W. Rep. 822 (Tex.). See also Hefner *v.* Palmer, (1873), 67 Ill. 161; Johnson *v.* Hurley (1893), 115 Mo. 513; 22 S. W. Rep. 492; Armstrong

Contrast this law with the contention of the HARVARD LAW REVIEW when reduced, as I think, to its true effect, and observe the anomalies: "A person who is not a partner cannot be made liable upon contracts of the partnership, except" by estoppel. But a person who is not a principal may be liable upon the contract of a man who is not his agent, but a pretended agent only, upon the ground of agency.

Where there is no partnership the American would succeed by estoppel only. But where there is no agency, other than a pretended one, he would succeed upon "agency or estoppel whichever" he "may choose to invoke."

Where there is no partnership and nothing done, the Patagonian would fail; for he "did nothing on the faith of" the appearance of partnership. But where there is no ageney, but a pretended one only, on the faith of any appearance, he would succeed "on the ground of agency."

It does not sound quite right. It is better to say that where there is no partnership, there is no liability upon the ground of partnership; where there is no agency, there is no liability upon the ground of agency; and where estoppel is claimed, the asserter of it must show that he, and not other people, have been misled by false appearances.

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WINNIPEG, CANADA.

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v. Potter (1894), 103 Mich. 409; 61 N. W. Rep. 657; Marschall *v.* Aikin (1897), 70 Mass. 3; 48 N. E. Rep. 845; Atlanta *v.* Hunt (1897), 100 Tenn. 94; 42 S. W. Rep. 483; Thornton *v.* McDonald (1899), 33 S. E. Rep. 680 (Ga.); Pomeroy's Eq. Jur. § 812. Mr. Bigelow says, "This is the true rule, though it has sometimes been supposed that all men may treat one as a partner who holds himself out as such." (On Estoppel, p. 565 n.) See also Mechem on Agency, § 84; Ewart on Estoppel, Chaps. 10 and 27.